

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of the Commission's Rules)
To Permit Flexible Service Offerings)
in the Commercial Mobile Radio Service)

WT Docket No. 96-6

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COMMENTS OF
COLE, RAYWID & BRAVERMAN

The law firm of Cole, Raywid & Braverman ("CRB"), pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415 (1995), submits these Comments in the referenced proceeding examining whether the Commission's rules governing the commercial mobile radio services ("CMRS") should be amended to permit the provision of fixed wireless local loop and other fixed services by CMRS providers.¹ CRB urges the Commission to amend its rules to allow *all* CMRS providers to offer all forms of fixed service, without restriction. Such amendment of the rules is consistent with relevant statutory authority, would benefit consumers by speeding the development of competitive communications markets, and would conserve the increasingly taxed resources of the FCC by eliminating the need for the Commission to initiate rule makings or review waiver requests concerning CMRS providers.

¹ These Comments are timely filed pursuant to the extension until March 1, 1996 granted by *Order* in WT Docket 96-17, DA 96-225, released February 23, 1996.

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I. Relevant Statutory Authority Gives the Commission Discretion to Permit Flexible Service Offerings

CRB supports the Commission's proposal to clarify its rules to allow broadband CMRS providers to offer fixed wireless local loop services², and agrees with the Commission's suggestion that all CMRS categories should be afforded fixed service offering flexibility due to the substantial similarity among commercial mobile radio services that either presently exists, or will result from, potential competition.³ In addition to the fact that strong economic policy considerations dictate the adoption of rules that will allow CMRS providers to respond to market demands, no statutory impediment exists to the adoption of flexible service rules for CMRS providers.

In the *NPRM*, the Commission cited the primary statutory authority that will allow it to adopt rules permitting the assignment of spectrum for more than one use. Specifically, under Section 303 of the Communications Act of 1934, the Commission is directed to "[p]rescribe the nature of service to be provided by each class of licensed stations"⁴, and to "generally encourage the larger and more effective use of radio in the public interest".⁵ At no point in any of the relevant statutory authority is the Commission limited to assigning spectrum for one specific use only. In fact, as noted in the *NPRM*, Congress has specifically

² See Notice of Proposed Rule Making in *WT Docket 96-6, Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services ("NPRM")*, FCC 96-17, released January 25, 1996, at ¶ 13.

³ See *NPRM* at ¶¶ 16, 18.

⁴ 47 U.S.C. § 303(b).

⁵ 47 U.S.C. § 303(g).

instructed the Commission to encourage the provision of new technologies and services to the public.⁶

Moreover, the landmark Telecommunications Act of 1996 (the "1996 Act")⁷, which was signed into law after the *NPRM* in this docket was released, does not amend any of the relevant statutory provisions, and accordingly the cited provisions remain persuasive authority for allowing the proposed rule amendments. However, an examination of certain provisions within the 1996 Act and Congress' stated intent in passing the 1996 Act is particularly instructive and timely to this particular rule making.

For example, the Conference Committee's discussion of the definition of "local exchange carrier" is instructive regarding Congress' intent that the Commission be able to react to market conditions in establishing appropriate regulatory parameters for all telecommunications services. In the *Joint Explanatory Statement*, the Conference Committee explains that the Senate definition of "local exchange carrier" was included in the legislation over the House version "to ensure that the Commission could, if future circumstances warrant, include CMS providers which provide telephone exchange service or exchange access in the definition of 'local exchange carrier.'"⁸ Clearly, since Congress has just expressed its expectation that CMS providers will, at some point, provide local exchange service that is competitive with the LECs, it would be contrary to congressional intent for the Commission

⁶ See 47 U.S.C. § 157(a).

⁷ Pub. L. No. 104-104, 110 Stat. 56 (1996), to be codified at 47 U.S.C. § 1, et seq.

⁸ *Joint Explanatory Statement*, 142 Cong. Rec. H1108 (daily ed. Jan. 31, 1996).

to decline to adopt rules that will provide CMRS licensees with the opportunity to begin to compete in the local exchange arena.

In the Joint Explanatory Statement of the Committee of Conference for Public Law 104-104 ("Joint Explanatory Statement"), Congress stated that its purpose in enacting the 1996 Act was "to provide for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information services to all Americans by opening all telecommunications markets to competition...".⁹ Further, specific statutory provisions within the 1996 Act highlight congressional intent for the Commission to respond to competitive market conditions in crafting or revising a regulatory paradigm for commercial mobile services. For example, Section 401 of the 1996 Act amends Title 1 of the Communications Act by adding a new section that instructs the Commission to forbear from applying any regulation or statutory provision to any telecommunications provider or service (which includes CMRS¹⁰), if the Commission determines that enforcement of those provisions is unjust, unnecessary for the protection of consumers or inconsistent with the public interest.¹¹ In determining whether or not regulatory forbearance is appropriate, Congress instructs the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to

⁹ *Joint Explanatory Statement*, 142 Cong. Rec. H1107 (daily ed. Jan. 31, 1996).

¹⁰ *See Joint Explanatory Statement*, 142 Cong. Rec. H1107 (definition of "telecommunications service" intended to include commercial mobile service).

¹¹ *See* 47 U.S.C. § 160(a).

which such forbearance will enhance competition among providers of telecommunications services."¹²

Congress has made its intentions quite clear as to how regulations governing the telecommunications industry are to be drafted and interpreted: as broadly and expansively as possible so that the private sector can rapidly respond to competitive market pressures, and not be restricted by unnecessary regulatory restrictions that serve to impede rather than promote improved telecommunications service to the public. Accordingly, both statutory authority and recent congressional expressions of legislative intent support Commission adoption of flexible service rules for CMRS providers.

II. Public Policy Also Supports Expansive Permissible Service Definition

At several points in the *NPRM*, the Commission requests comment on whether currently allocated spectrum for commercial mobile radio services will provide sufficient capacity for mobile uses if fixed services are also allowed,¹³ and whether this consideration should influence the regulatory approach adopted. However, the Commission also states its belief that the regulatory approach adopted "should allow licensees to adapt quickly to technological innovation and changing consumer demands."¹⁴ CRB urges the Commission to adopt flexible service rules for *all* CMRS providers so that "economic forces, and not

¹² See 47 U.S.C. § 160(b).

¹³ See *NPRM* at ¶14, 17, 24.

¹⁴ *NPRM* at ¶ 24.

disparate regulatory requirements, shape the development of the CMRS marketplace."¹⁵ Such an approach would be consistent not only with Congress' intent to establish regulatory symmetry among mobile services¹⁶, but with the procompetitive economic regulatory policies adopted by the Commission in several recent proceedings.¹⁷ For example, in its Notice of Proposed Rule Making in CC Docket 95-185, the Commission tentatively concluded that it should "move expeditiously" to adopt interim policies to govern LEC-CMRS interconnection rates "in order to ensure the continued development of wireless services as a potential competitor to [such fixed services as] LEC services"¹⁸.

As the Commission correctly notes, it should adopt a CMRS permissible service regulatory approach that will allow licensees in the fiercely competitive CMRS marketplace to adapt quickly to technological innovation and changing consumer demand.¹⁹ If the marketplace does not create a demand for fixed service-type applications offered by CMRS

¹⁵ *NPRM* at ¶ 19.

¹⁶ See *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A) and § 6002(b)(2)(B), 107 Stat. 312 (1993).

¹⁷ See, e.g., *Second Report and Order in GN Docket No. 93-252, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411 (1994); *First Report and Order and Second Notice of Proposed Rule Making in ET Docket No. 94-32, In the Matter of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, 10 FCC Rcd 4769 (1995); *Second Report and Order in ET Docket No. 94-32*, 60 Fed. Reg. 40,712 (Aug. 9, 1992); *Memorandum Opinion and Order in CC Docket No. 91-141, In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154 (1994).

¹⁸ See *Notice of Proposed Rule Making in CC Docket 95-185, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC 95-505, released January 11, 1996, at ¶ 3.

¹⁹ See *NPRM* at ¶ 24.

providers, those service providers will be forced to adjust their service offerings accordingly, or be forced out of the market. In any event, CMRS licensees should only be constrained by market forces or their own business judgements, and not by unnecessary regulatory restrictions seeking to preserve spectrum for uses for which there is less consumer demand.

III. Regulatory Treatment

The Commission also seeks comment on the appropriate regulatory treatment to be applied to CMRS providers that are also allowed to provide fixed services.²⁰ In this proceeding, the Commission seeks to clarify its characterization of "permissible use" in its CMRS rules so that mobile service carriers are no longer hesitant about expanding on the scope of permissible services they offer to their customers.²¹ The proposed clarification and broadening of the permissible use definition for all CMRS providers in no way impacts the statutory prohibition against state and local rate and entry regulation of CMRS providers. As long as CMRS providers meet the statutory prerequisite of offering interconnected, for-profit mobile service to the public as required by the Communications Act,²² this burgeoning industry should continue to be protected from disparate regulatory regimes that could discourage CMRS providers from offering combined mobile and fixed service packages that would benefit consumers. Congress has provided for such protection from entry and rate

²⁰ See *NPRM* at ¶ 19.

²¹ See *NPRM* at ¶ 5.

²² See 47 U.S.C. § 332(c)(3).

regulation for the developing CMRS industry, and since the LECs are in no present danger of having their primary markets usurped by CMRS providers, such protection is still warranted.

It is axiomatic that new entrants into previously monopolistic industries should be afforded some regulatory latitude in order to compete. Otherwise, all new competition would be crushed by incumbent service providers. Further, and as noted in Section I. above, Congress has given the Commission discretion in determining when CMS providers should be classified as local exchange carriers.²³ CRB fully supports the principle that similarly situated competing providers of local telephone service should be regulated similarly, regardless of the service delivery mechanism. However, until such competition takes hold, i.e., until "such [CMS] services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state"²⁴, the CMRS industry continues to require protection from excessive regulation in order to compete and survive. As competition takes hold, the appropriate regulatory framework, such as inclusion of CMS in the statutory definition of local exchange carrier and the concomitant regulatory obligations that definition invokes, can and should be modified accordingly.

IV. Conclusion

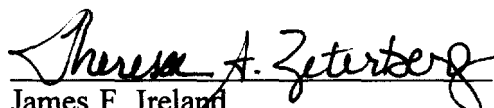
CRB supports the flexible regulatory scheme proposed by the Commission in the captioned docket. Specifically, CRB urges the Commission to amend its rules to allow *all* CMRS providers to offer all forms of fixed service, without restriction. As noted above, such

²³ See *Joint Explanatory Statement*, 142 Cong. Rec. H1108 (daily ed. Jan. 31, 1996).

²⁴ 47 U.S.C. § 332(c)(3)(a).

an amendment is consistent with relevant statutory authority and legislative intent, would benefit consumers, and would eliminate the need for the Commission to initiate rule making proceedings or review waiver requests every time a CMRS provider wishes to adjust its operations to respond to market demands.

Respectfully submitted,
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